Supreme Court, U. S.
FILED
APR 10 1980
MICHAEL RODAK, JR., CLERK

No. 79-1123

In the Supreme Court of the United States

OCTOBER TERM, 1979

CLARENCE NEVILLE, PETITIONER

v.

C. JOSEPH CAVANAGH AND GEORGE A. RALSTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1123

CLARENCE NEVILLE, PETITIONER

v.

C. JOSEPH CAVANAGH AND GEORGE A. RALSTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 611 F. 2d 673. The opinion of the district court (Pet. App. 13a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1979. The petition for a writ of certiorari was filed on January 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

QUESTION PRESENTED

Whether the United States District Court had jurisdiction to issue a writ of habeas corpus to prevent petitioner's trial on state charges.

---

[1]This brief is submitted in response to a request of the Clerk of the Court dated February 8, 1980.

STATEMENT

In June 1976, petitioner was a prisoner serving a ten-year sentence in the federal penitentiary in Terre Haute, Indiana, where respondent Ralston is the warden. At that time, the state's attorney in Sangamon County, Illinois filed a detainer against petitioner with the federal authorities at the Terre Haute prison. See Ill. Rev. Stat. ch. 38, § 1003-8-9 (1975). The detainer was based on 28 indictments pending against petitioner in Sangamon County. Petitioner was transferred to Sangamon County Jail on June 6, 1976, and his trial on the Illinois charges was set for October 25, 1976. One week before trial, petitioner's retained counsel requested a continuance due to counsel's illness. The court granted a continuance until January 1977, with a specific trial date to be set later, and ordered that petitioner be returned to federal custody. Petitioner was returned to the federal penitentiary in Terre Haute in October.

In January 1977, petitioner filed a pretrial motion to dismiss the state indictments in Sangamon County Court, asserting that his return to federal custody prior to trial violated Article IV(e) of the Interstate Agreement on Detainers Act.[2] The trial court denied the motion. Petitioner then filed a petition with the Illinois Supreme Court seeking permanent prohibition of the trial and dismissal of the indictments with prejudice. The Illinois Supreme Court denied the petition for a writ of pro-

[2]Article IV(e) provides:

> If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

hibition, holding that dismissal of the state indictments was not required under the Act, since petitioner himself had sought the continuance resulting in the lengthy trial delay and had not objected to being returned to Terre Haute. See *Neville* v. *Friedman*, 67 Ill. 2d 488, 367 N.E. 2d 1341 (1977). This Court thereafter denied petitioner's petition for a writ of certiorari. 437 U.S. 903 (1978).

Petitioner then filed a petition for a writ of habeas corpus and an application for a temporary restraining order in the United States District Court for the Southern District of Illinois. The district court ruled that the petition was premature and denied petitioner's requests for relief (Pet. App. 13a-17a). The court of appeals affirmed (Pet. App. 1a-7a), concluding that no special circumstances justified federal intervention in a state criminal trial.[3] Because petitioner might be acquitted at trial or otherwise prevail in the state courts, the court held that habeas corpus relief was improper at that time. The court noted that its decision did not bar federal consideration of petitioner's claim, but merely delayed such consideration until "a time when federal jurisdiction will not seriously disrupt state judicial processes" (*id.* at 7a).[4]

[3]While his appeal was pending, petitioner was paroled from the federal penitentiary in Indiana. The State of Illinois, which had initiated extradition proceedings against petitioner, issued fugitive warrants against him. Petitioner, who refused to waive extradition, was transferred to the custody of the sheriff of Vigo County, Indiana, and was arraigned on the warrants. He was granted bail on the condition that he remain in the State of Indiana.

[4]Judge Cudahy dissented (Pet. App. 7a-12a). In his view, the Illinois Supreme Court's ruling on the merits in the instant case satisfied the interests of comity between federal and state courts that underlie the habeas corpus exhaustion requirement and constituted "special circumstances" warranting pretrial habeas corpus review.

ARGUMENT

Petitioner contends (Pet. 5-7) that the courts below should have considered his request for habeas corpus relief on the merits. The decision of the court of appeals rejecting this claim does not conflict with any decision of this Court or any court of appeals, and further review is unwarranted.

1. At the outset, we note that petitioner's claim is one of first impression. He depends entirely upon the unusual fact that Illinois' highest court has already considered his contention that the state's prosecution will violate Article IV(e) of the Interstate Agreement on Detainers ("IAD"). As Judge Cudahy remarked in his dissenting opinion (Pet. App. 8a; emphasis in original): "This case is unique and likely to remain so. No other case involving pre trial habeas corpus has been cited where the highest court of a state has previously considered *precisely the same issue* as applied to the *very same party* as involved in the federal habeas corpus petition and where the court has by a *full opinion* definitively * * * and authoritatively resolved the issue." Given the singularity of the circumstances underlying this case, it is doubtful whether the issue is of sufficient importance to justify plenary review by this Court.[5]

2. As we discuss below, the court of appeals correctly concluded that petitioner's claim for relief was premature. We further submit that petitioner was not entitled to relief for still another reason. Although not adverted to by the courts below, it is doubtful whether claims under the IAD are ever subject to review in a habeas corpus proceeding.

---

[5]If the lower courts had enjoined the state prosecution, considerations of federalism might have weighed significantly in favor of review despite the novelty of the issues presented. Compare *Arizona* v. *Manypenny*, petition for cert. pending, No. 79-621.

a. The jurisdictional basis of petitioner's request for relief is 28 U.S.C. 2241(c)(3). That statute, like 28 U.S.C. 2254(a) and 2255, provides that a writ of habeas corpus is available only to a person "in custody in violation of the Constitution or laws or treaties of the United States." The Court has made clear, however, that not all violations of a federal statute are cognizable in a collateral proceeding. Rather, "the appropriate inquiry [is] whether the claimed error of law [is] 'a fundamental defect which inherently results in a complete miscarriage of justice' * * *." *Davis* v. *United States*, 417 U.S. 333, 346 (1974), quoting *Hill* v. *United States*, 368 U.S. 424, 428 (1962). See *United States* v. *Timmreck*, 441 U.S. 780, 783-784 (1979).[6] Petitioner's claim falls far short of that standard.

Petitioner merely asserts that the trial court's decision to return petitioner to federal custody in conjunction with *petitioner's* request for an extended continuance violated Article IV(e) of the IAD. That technical violation - if it is a violation at all—is wholly unrelated to a fair determination of petitioner's guilt or innocence, and has not prejudiced him in any significant fashion. It is therefore apparent that the possibility of petitioner's conviction will in no sense constitute a "complete miscarriage of justice." *United States* v. *Timmreck*, *supra*, 441 U.S. at 784; *Davis* v. *United States*, *supra*, 417 U.S. at 346; *Hill* v. *United States*, *supra*, 368 U.S. at 428. Accordingly, petitioner's claim under the IAD is simply not a basis for either pretrial or post-conviction collateral relief. See, *e.g.*, *Mars* v. *United States*, No. 79-5043 (6th

---

[6]Although this case involves a pretrial rather than a post-conviction collateral attack, the standard would appear to be the same, since the critical language in Sections 2241(c)(3), 2254 and 2255 is the same. See *Davis* v. *United States*, *supra*, 417 U.S. at 344 ("the grounds for relief under §2255 are equivalent to those encompassed by §2254").

Cir. Jan. 31, 1980), slip op. 5-6; *Huff* v. *United States*, 599 F. 2d 860, 863 (8th Cir. 1979), cert. denied, No. 79-5275 (Nov. 13, 1979); *Hitchcock* v. *United States*, 580 F. 2d 964, 965-966 (9th Cir. 1978); *Edwards* v. *United States*, 564 F. 2d 652, 653-654 (2d Cir. 1977).

b. In any event, petitioner's petition for a writ of habeas corpus was premature. It is well settled that "federal habeas corpus does not lie, absent 'special circumstances,' to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court." *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 489 (1973), citing *Ex parte Royall*, 117 U.S. 241, 253 (1886). See, *e.g.*, *United States ex rel. Parish* v. *Elrod*, 589 F. 2d 327, 328-329 (7th Cir. 1979); *Moore* v. *DeYoung*, 515 F. 2d 437, 443 (3d Cir. 1975); *Tooten* v. *Shevin*, 493 F. 2d 173 (5th Cir. 1974). Here, as the court of appeals concluded, petitioner failed to demonstrate "special circumtances" justifying pretrial federal intervention in a state criminal proceeding.

To be sure, the Supreme Court of Illinois has already ruled on the merits of petitioner's claim under the IAD. But even assuming that the decision satisfied the requirement of exhaustion of state remedies applicable to federal habeas corpus proceedings generally,[7] this Court has made clear that more is required before a district court is warranted in granting the extraordinary pretrial relief sought here. Thus, in *Braden*, *supra*, the Court held that the state defendant was entitled to pretrial habeas corpus relief because he was seeking to enforce the state's obligation to bring him promptly to trial and because he

[7]See 28 U.S.C. 2254(b); *Moore* v. *DeYoung*, *supra*, 515 F. 2d at 442; *Tooten* v. *Shevin*, *supra*, 493 F. 2d at 175 n.7.

had exhausted all his state remedies. As the Court expressly noted, however (410 U.S. at 491-493):

> [P]etitioner made no effort to abort a state proceeding or to disrupt the orderly functioning of state judicial processes. He comes to federal court, not in an effort to forestall a state prosecution, but to enforce the Commonwealth's obligation to provide him with a state court forum. * * * A federal habeas corpus action at this time and under these circumstances does not jeopardize any legitimate interest of federalism.
>
> * * * * *
>
> We emphasize that nothing we have said would permit the derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court.

Here, in contrast, petitioner seeks to abort a pending state trial while he litigates an affirmative *statutory* defense in federal court. Although federal intervention at this stage would not deprive the state courts of an opportunity to pass upon petitioner's IAD claim, it would threaten the integrity of the state judicial process in another respect. As with all pretrial habeas claims, there is no assurance that petitioner will ultimately prevail on the merits of his claim. If, as is likely, petitioner's claim is rejected on the merits after protracted litigation, the state prosecution will have been substantially delayed. Indeed, two and a half years have already passed since the decision of the Supreme Court of Illinois was rendered. Thus, the costs to a state's criminal justice system of allowing federal pretrial review seemingly outweigh the potential benefits to individual defendants, except perhaps in the truly extraordinary case. Accordingly, the courts below correctly dismissed petitioner's request for a writ of habeas corpus as premature. See also *Younger* v. *Harris*, 401 U.S. 37 (1971).

Relying on *Abney* v. *United States*, 431 U.S. 651 (1977), petitioner nevertheless contends (Pet. 6) that he is entitled to pretrial habeas corpus review of his detainer claim because "he is contesting the very authority of the [state] to hale him into court to face trial on the charge against him." 431 U.S. at 659. This argument is without merit. First, a violation of Article IV(e) of the Act is not jurisdictional in nature, but rather is an affirmative statutory defense that may be waived. See, *e.g.*, *United States* v. *Palmer*, 574 F. 2d 164, 166-167 (3d Cir.), cert. denied, 437 U.S. 907 (1978); *United States* v. *Ford*, 550 F. 2d 732, 742 (2d Cir. 1977), aff'd *sub nom. United States* v. *Mauro*, 436 U.S. 340, 348 n.12 (1978). Furthermore, *Abney* merely involved the question whether a federal defendant could take a pretrial appeal regarding a double jeopardy claim. Nothing in the *Abney* decision suggests that state defendants are entitled to a pretrial state appeal in similar circumstances, much less that a state defendant may seek pretrial federal relief with regard to a statutory defense. To the contrary, the Court emphasized that "there is no constitutional right to an appeal" and that "[t]he right of appeal * * * is purely a creature of statute." 431 U.S. at 656.[8]

[8]Indeed, petitioner's claim rests on the fact that Illinois state practice permitted him to appeal his detainer claim prior to trial—an appeal not required by the Constitution and not available in federal practice. See *United States* v. *MacDonald*, 435 U.S. 850 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

DEBORAH WATSON
Attorney

APRIL 1980